KESATUAN KEBANGSAAN PEKERJA-PEKERJA BANK A

v.

MENTERI SUMBER MANUSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
AZIAH ALI J
[JUDICIAL REVIEW NO: R1-25-299-2008]
31 JANUARY 2011

LABOUR LAW: *Trade dispute - Locus standi - Negotiation for new Collective Agreement (CA) - Applicant's invitation to second respondent to negotiate CA rejected - Applicant reported rejection as trade dispute and sought referral of matter to Industrial Court - Applicant not accorded recognition by second respondent - Whether applicant had locus standi to invite second respondent to negotiate - Whether any trade dispute existed - Whether CA could be novated by vesting order - Rules of the High Court 1980, O. 53 - Industrial Relations Act 1967, ss. 9, 11, 13, 14, 17, 18 & 26* C D

The applicant, the National Union of Bank Employees ('NUBE') applied under O. 53 of the Rules of the High Court 1980 for an order of *certiorari* to quash the first respondent's decision not to refer a purported trade dispute to the Industrial Court for adjudication. The dispute concerned the second respondent's refusal of NUBE's request to commence collective bargaining to conclude a new Collective Agreement ('CA') for the period 1 January 2003 till 31 December 2005 ('the new CA'). NUBE also sought an order of *mandamus* to direct the first respondent ('the Minister') to refer the matter to the Industrial Court for adjudication. In 2001, NUBE had signed a CA ('the first CA') with the Malayan Commercial Banks' Association ('MCBA') during which time an entity called AmBank Bhd was a member of MCBA. Pursuant to a vesting order in 2005, all of AmBank Bhd's business, contracts, obligations and liabilities were transferred to AmFinance Bhd which changed its name to AmBank (M) Berhad (the second respondent). The employees of AmBank Bhd, including those who were members in NUBE, were transferred to work in the second respondent. Following the vesting, the second respondent signed a CA with the in-house union of its employees, KEPPA (the third respondent). E F G H

It was NUBE's submissions (i) that since AmBank Bhd was a party to the first CA and bound by it, the vesting order made the second respondent equally bound (ii) the recognition previously granted to NUBE by AmBank Bhd subsisted and this enabled NUBE to negotiate a new CA for its members now employed by the second respondent (iii) the first CA ought to prevail over the CA signed between the second and third respondents (iv) there was no reason why two CAs I

could not be in force at the same time within the second respondent - one which protected members of NUBE and the other which protected members of the third respondent. NUBE submitted in view of the serious issues involved in the dispute, the Minister erred in not referring the matter to the Industrial Court for adjudication.

Held (dismissing the application):

(1) AmBank Bhd and the second respondent were two separate entities. NUBE's contention that the second respondent was bound by the first CA between NUBE and AmBank Bhd could not be sustained as AmBank Bhd still existed. The second respondent was never a member of MCBA nor had it ever had a CA with NUBE or MCBA. (para 33)

(2) No recognition had been accorded by the second respondent to NUBE. NUBE thus failed to satisfy the requirements of s. 13 of the Industrial Relations Act ('IRA') which expressly provided that only a trade union that had been accorded recognition by an employer may invite the employer to commence collective bargaining. (para 34)

(3) Since NUBE had not satisfied the requirements of s. 13 of the IRA, there was no trade dispute to be referred to the Industrial Court. (para 35)

(4) The CA could not be novated through a simple vesting order. A CA was subject to statutory provisions, in particular s. 14(2) of the IRA, which *inter alia* provided that a CA shall prescribe the procedure for its modification and termination. (para 37)

(5) Having accorded recognition to KEPPA, the second respondent was bound by s. 9 of the IRA and therefore could not accord recognition to NUBE. Under the CA between the second respondent and KEPPA there could not be another union, besides KEPPA, representing the second respondent's employees. (paras 36 & 38).

(6) The Minister did not err in his decision not to refer the matter to the Industrial Court for adjudication. His decision did not suffer from the infirmities of illegality, irrationality or procedural impropriety. (para 39)

Case(s) referred to:

Kesatuan Kebangsaan Wartawan Malaysia & Anor v. Syarikat Pemandangan Sinar Sdn Bhd & Anor [2001] 3 CLJ 547 FC ***(refd)***

Dynamic Plantations Bhd v. YB Menteri Sumber Manusia & Anor [2010] 2 CLJ 525 FC ***(refd)***

Kennesion Brothers Sdn Bhd v. Construction Workers Union [1989] 2 CLJ 569; [1989] 1 CLJ (Rep) 54 SC ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989, s. 50
Industrial Relations Act 1967, ss. 9, 11, 13(1), (6) 14(2), 17(1)(a), 18(5), 26(2), (3)
Rules of the High Court 1980, O. 53

For the applicant - Alex De Silva; M/s Bodipalar Ponnudurai De Silva
For the 1st respondent - Azlina Mahmod SFC; AG's Chambers
For the 2nd respondent - S Rutheran; The Chambers of R Sivagnanam & Assocs
For the 3rd respondent - M Eswary; The Law Firm of M Eswary

Reported by Ashok Kumar

JUDGMENT

Aziah Ali J:

[1] The applicant applies for judicial review under O. 53 of the Rules of the High Court 1980 for the following orders:

(i) an order of *certiorari* to quash the decision of the 1st respondent, the Honourable Minister dated 5 October 2008 not to refer a purported trade dispute between the applicant and the 2nd respondent regarding the collective agreement for the period 1 January 2003 till 31 December 2005 to the Industrial Court for adjudication, and

(ii) an order of *mandamus* to direct the 1st respondent to refer the matter to the Industrial Court for adjudication and an award in respect of the dispute on the applicant's CA for the period 1 January 2003 to 31 December 2005.

Background

[2] According to the applicant, it is a registered national trade union since 1958 representing approximately 28,000 employees from the non-clerical, clerical and senior clerical categories in the banking and financial institutions in Peninsular Malaysia. On 7 Mac 2001, the applicant signed a Collective Agreement Cog No: 73/2001 with Malayan Commercial Banks' Association ("MCBA") which was enforceable for the period 1 January 2000 to 31 December 2002 ("the 2000-2002 CA"). The applicant says that at the material time, AmBank Berhad was a member of MCBA and was accordingly bound by the said agreement.

[3] On 13 December 2004, the Director-General of Trade Unions ("DGTU") registered Kesatuan Pekerja-Pekerja AmFinance Berhad ("KEPPA") as an in-house union for the employees of AmFinance

Berhad. KEPPA thereafter obtained recognition from AmFinance Berhad on 30 December 2004. AmFinance Berhad and AmBank Berhad were both members of the AmBank Group.

[4] Pursuant to a vesting order dated 18 May 2005 granted by the Kuala Lumpur High Court, all of AmBank Berhad's business, contract, obligations and liabilities were transferred to AmFinance Berhad.

[5] On 1 June 2005, AmFinance Berhad changed its name to AmBank (M) Berhad (the 2nd respondent). As a result, the employees of AmBank Berhad, including those who were in benefit of membership in the applicant, were transferred to work in the 2nd respondent.

[6] On 2 June 2005, the 2nd respondent signed a CA Cog No: 167/2005 with KEPPA to which the Industrial Court gave cognisance on 12 August 2005. On 3 January 2006, KEPPA changed its name to Kesatuan Pekerja-Pekerja AmBank (M) Berhad (the 3rd respondent herein).

[7] On 5 June 2006, the applicant by letter presented an invitation to the 2nd respondent to commence collective bargaining with a view to conclude a new CA for the period 1 January 2003 to 31 December 2005 ("the New CA").

[8] The applicant's invitation was however rejected by the 2nd respondent on 4 July 2006 on the basis that the 2nd respondent was not a party to the 2000-2002 CA and that they had already signed a CA Cog No: 167/2005 with the 3rd respondent.

[9] On 2 October 2006, the applicant proceeded to report the dispute pertaining to the New CA with the Director-General of Industrial Relations, Malaysia ("DGIR") as a trade dispute between the applicant and the 2nd respondent under s. 13(6) of the IRA.

[10] Conciliation failed and the applicant then requested the DGIR to notify the 1st respondent about the dispute in accordance with s. 18(5) of the IRA and to seek reference of the dispute to the Industrial Court pursuant to s. 26(2) of the IRA.

[11] On 20 August 2008, the applicant received a letter from the DGIR dated 12 August 2008 enclosing the 1st respondent's decision dated 5 August 2008 not to refer the dispute in respect of the New CA to the Industrial Court.

[12] The applicant contends that the decision of the Minister is unreasonable and the Minister has acted outside his jurisdiction and/or has committed an error of law having decided not to exercise his discretion properly under s. 26(2) of IRA which provides as follows:

26. Reference of trade disputes to the Court.

(1) Where a trade dispute exists or is apprehended, the Minister may, if that dispute is not otherwise resolved, refer the dispute to the Court on the joint request in writing to the Minister by the trade union of workmen which is a party to the dispute or a trade union of employers which is a party to the dispute.

(2) The Minister may of his own motion or upon receiving the notification of the Director General under section 18(5) refer any trade dispute to the Court if he is satisfied that it is expedient so to do:

Provided that in the case of a trade dispute in any Government service or in the service of any statutory authority, reference shall not be made except with the consent of the Yang di-Pertuan Agong or State Authority as the case may require.

Submissions

[13] For the applicant counsel submits that the issue of recognition of the applicant by the 2nd respondent or the recognition of KEPPA by the 2nd respondent which appears to be the main ground for the Minister's decision is immaterial and irrelevant.

[14] Counsel submits that art. 2 of the 2000-2002 CA provides that the 2000-2002 CA continues to be binding upon parties until it is terminated by a party to the agreement or is replaced by a new CA. AmBank Bhd was a party to the 2000-2002 CA. Before the vesting, on 25 April 2005 AmBank Bhd had by letter acknowledged and recognized the 2000-2002 CA and had requested its employees to resort to the grievance procedure under art. 4 of the 2000-2002 CA regarding complaints they had.

[15] It is submitted that on 18 May 2005 ie, the date of the vesting order, the 2000-2002 CA was still valid and binding on parties ie, the 2nd respondent since by the terms of the vesting order all of AmBank Bhd's business, contracts, rights, obligations and liabilities were transferred to AmFinance Bhd which changed its name to the 2nd respondent on 1 June 2005. Counsel refers to the vesting order which states as follows:

5. Any Contract (to the extent that it is still in force or has any effect) shall have effect as from the Scheme Date as if AmFinance had been a party thereto instead of Am Bank.

12. In respect of any right or liability of AmBank transferred to AmFinance pursuant to this Order, AmFinance shall have the same rights, powers and remedies (and in particular the same

A rights and powers as to taking or resisting legal proceedings or making or resisting applications to any authority) for ascertaining, protecting or enforcing that right or resisting that liability of Am Bank as if it had at all times been a right or liability of AmFinance, including those rights or liabilities in respect of any legal proceedings or applications to any authority pending
B immediately before the Scheme Date or against AmBank.

[16] It is submitted that by virtue of s. 50 of the Banking and Financial Institutions Act 1989 ("BAFIA") the effect of the vesting order is that all the rights, assets and liabilities of AmBank Bhd were
C transferred to the 2nd respondent. The obligations of AmBank Bhd under the 2000-2002 CA were preserved and naturally flow to the 2nd respondent and the 2nd respondent is still bound by the 2000-2002 CA. The 2nd respondent therefore stands in the same position where AmBank Bhd was before the vesting. Therefore it is submitted that the recognition previously granted to the applicant by AmBank Bhd
D continued to subsist and was still valid and this enables the applicant to negotiate a new CA for its members now employed by the 2nd respondent. The issue of recognition of the applicant by the 2nd respondent does not arise and there is no issue of the recognition being withdrawn or being rendered invalid.

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[17] Counsel submits that art. 2 of the 2000-2002 CA expressly stipulates as follows:

Effective Date And Duration

F This Agreement shall be deemed to have come into effect on 1st January 2000 and shall continue to remain in force until 31st December 2002 and thereafter until superseded by a new Agreement.

It is submitted that there is no evidence that either the applicant or the 2nd respondent had terminated the 2000-2002 CA. In the absence of a
G termination, it is submitted that the 2nd respondent continued to be bound and be a party to the 2000-2002 CA and the 2000-2002 CA is enforceable against the 2nd respondent.

H **[18]** Counsel submits that the Minister has failed to take into account s. 17(1)(a) of IRA which provides as follows:

17. Effect of collective agreement.

I (1) A collective agreement which has been taken cognizance of by the Court shall be deemed to be an award and shall be binding on:

(a) the parties to the agreement including in any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates and their successors, assignees or transferees; and

(b) …

It is submitted that by virtue of s. 17(1) the 2nd respondent is bound by the 2000-2002 CA and cites the case of *Kesatuan Kebangsaan Wartawan Malaysia & Anor v. Syarikat Pemandangan Sinar Sdn Bhd & Anor* [2001] 3 CLJ 547 wherein Steve Shim CJ (Sabah & Sarawak) said:

> It is accepted that a collective agreement is one entered into between the employer and its employees or union of workmen normally for a period of three years. Under s. 17(1)(b), all employees are bound whether or not they are members of the union which negotiated the collective agreement or whether they join as employees subsequent to the date of the collective agreement. This provision in the Act cuts across the law of contract and is meant for the general application of the collective agreement on all the employees of a company. In our view, the same approach must apply to s. 17(1)(a) involving employers. The rationale is one of continuity of the collective agreement from the original parties and members of the union to their successors, assignees or transferees. It is meant to ensure that the rights and obligations of the parties to the collective agreement be preserved by those taking over from the original parties so as to maintain what Mohd. Azmi J in *Dunlop Estate Bhd (supra)* has aptly described as "good relationship and fair dealings between the employers and workers and their trade union and the settlement of any differences or disputes arising from their relationship." And we may add that this is essential in promoting social justice, industrial peace and harmony in Malaysia.

[19] Counsel refers to the case of *Dynamic Plantations Bhd v. YB Menteri Sumber Manusia & Anor* [2010] 2 CLJ 525 wherein the Federal Court said that despite the cessation of the appellant as members of MAPA, the collective agreement was in force by virtue of art. 2 part 1 of the collective agreement which provides for the collective agreement to run until superseded by a new collective agreement or an award of the Industrial Court. In the absence of a new collective agreement or decision of the court to vary it, the collective agreement continues to be in force and the question of the second respondent not being recognized does not arise. Therefore counsel submits that since the 2000-2002 CA was still valid and subsisting at the time the vesting order was made and at the time the 3rd respondent signed its CA with the 2nd respondent and recognized by the Industrial Court on 12 August 2005, the 2000-2002 CA continues to bind the 2nd respondent. Counsel

submits that the argument of the respondents that the applicant had never obtained recognition unlike the 3rd respondent and as such is not entitled to invite the 2nd respondent to negotiate a new CA is untenable and must fail.

[20] Counsel submits that the 2000-2002 CA ought to prevail over the CA signed between the 2nd respondent and the 3rd respondent. It is further submitted that there is no reason why two CAs cannot be in force at the same time within the 2nd respondent's institution. The new CA would protect the group of employees who are members of the applicant whilst the CA between the 3rd respondent and the 2nd respondent is applicable to employees who are members of the 3rd respondent. Since the two groups of employees are separate and distinct, there would be no overlap or conflict with regard to trade union rights to be enforced by the 2nd respondent.

[21] It is submitted that the Minister has erred in the construction of the validity of the 2000-2002 CA that at the end of the 2000-2002 CA on 31 December 2002 the 2nd respondent was released from its obligations therein. It is submitted that the Minister has misread art. 2. Counsel submits that art. 2 expressly provides that the 2000-2002 CA remains in force until superseded by a new agreement. It is further submitted that the Minister has failed to appreciate the terms and legal effect of the vesting order in deciding the issue of the applicant's *locus standi* to negotiate a new CA. It is further submitted that the Minister has failed to consider the effect of s. 50 of BAFIA. Counsel submits that there are serious issues which can only be resolved by the Industrial Court. Therefore it is submitted that this court ought to interfere and remedy the injustice.

[22] Counsel for the 2nd respondent disagrees with the contention of the applicant's counsel that the issue of recognition does not arise. It is submitted that by virtue of s. 13(1) of the IRA recognition is a statutory pre-requisite for collective bargaining. Section 13(1) provides as follows:

> 13. Collective bargaining.
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> (1) Where a trade union of workmen has been accorded recognition by an employer or a trade union of employers:
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> (a) the trade union of workmen may invite the employer or trade union of employers to commence collective bargaining; or
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> (b) the employer or the trade union of employers may invite the trade union of workmen to commence collective bargaining.

Further the agreement between the applicant and MCBA further provides:

> Article 1 - Parties
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> (1) the parties bound by this Agreement are The Malayan Commercial Banks' Association, ... and its member Banks which have accorded recognition to the Union (hereinafter referred to as "the Bank" or "the Banks" when collectively referred to) of the one part and the National Union Of Bank Employees, States Of Malaya. ...

Counsel submits that the applicant reported the matter to the Industrial Relations Department as a trade dispute under s. 13(6) of IRA when the applicant has never obtained recognition as required under s. 13(1). This was conceded by the applicant in its Memorandum of Appeal in suit No. W-01-53-2006 when it states as follows:

> ... although recognition had not been granted and no CA was in existence ...

It is submitted that in the absence of recognition the applicant has no legal basis to present a trade dispute under s. 13(6) of IRA over the refusal of the 2nd respondent to negotiate terms of employment with it. Counsel for the 3rd respondent similarly submits that since the applicant was never recognized by the 2nd respondent, s. 13 can never be triggered and therefore the applicant did not have the requisite standing to pursue any trade dispute arising from the failure to negotiate a CA which it had no standing to negotiate in the first place.

[23] In the written submissions by counsel for the 3rd respondent is found the background that led to the existence of the 2nd respondent. The legal entity which constitutes the 2nd respondent was incorporated on 25 March 1969 under the name 'Malaysian Borneo Finance Corporation (M) Bhd' which changed its name to 'MBf Finance Berhad' on 19 December 1985. In 2001 the applicant attempted to seek recognition from MBf Finance Berhad but failed as a membership check by the DGTU revealed that only 43.49% of the employees of MBf Finance Berhad under the scope of the applicant's representation had become members of the applicant. Therefore MBf Finance informed the applicant that it would not accord recognition to the applicant to represent its employees under the scope of the applicant's representation.

[24] On 15 June 2002 there was a merger between MBf Finance Bhd and Arab-Malaysian Finance and the assets, liabilities, rights and obligations of Arab Malaysian Finance Bhd were transferred to MBf Finance Bhd which then changed its name to AmFinance Berhad. Since at that time there was no union representing the employees under the scope of representation of KEPPA, on 13 January 2004 KEPPA was

formed and on 22 December 2004 AmFinance Berhad accorded voluntary recognition to KEPPA. The applicant's attempt for the court to review the decision of the DGTU to register KEPPA was dismissed by the High Court, the Court of Appeal and the Federal Court.

[25] Pursuant to a merger exercise, by order dated 18 May 2005 AmFinance Berhad acquired the agreed assets and liabilities of AmBank Berhad. On 1 June 2005 AmFinance Berhad changed its name and is now known as AmBank (M) Berhad (the 2nd respondent). It operated under a new licence issued by the Ministry of Finance and continued to carry on its banking business. AmBank Berhad still exists and has been renamed. In September 2005 AmBank Berhad changed its name to AMBB Capital Berhad. On 21.2.2006 AMBB Capital Berhad changed its name to AmIslamic Bank Berhad. Thus it is submitted that the 2nd respondent is a separate and distinct entity from AmBank Berhad. The 2nd respondent was never a member of MCBA nor has it ever had a CA with the applicant or MCBA.

[26] Counsel for the 3rd respondent submits that by virtue of s. 11 of IRA, once a union is granted recognition no other union may present a claim for recognition for the same class of employees for a period of three years. Counsel for the 2nd respondent refers to the case of *Kennesion Brothers Sdn Bhd v. Construction Workers Union* [1989] 2 CLJ 569; 1989] 1 CLJ (Rep) 54 wherein the Supreme Court held as follows:

> Once the employer has accorded the recognition under s. 9(3)(a) of the Industrial Relations Act, there appears to be no provision in the Act, enabling the employer to act unilaterally in withdrawing or revoking the recognition.

[27] Counsel for the 2nd and 3rd respondents submit that on the facts the case of *Dynamic Plantations Bhd v. YB Menteri Sumber Manusia & Anor (supra)* cited by counsel for the applicant is distinguishable as in that case the Federal Court found that the employer had by conduct accorded recognition. The Federal Court held that recognition can also be granted by way of conduct of the parties and recognition under s. 9 of IRA is not the exclusive procedure for recognition. Counsel submits that the Federal Court did not hold that recognition is not a pre-requisite. It is submitted the facts in that case are not found in the present case for the following reasons:

(a) the 2nd respondent was never a member of MCBA;

(b) the 2nd respondent had never been a party to any CA with the applicant;

(c) the applicant has not obtained recognition from the 2nd respondent; A

(d) the 2nd respondent has accorded recognition to KEPPA;

(e) the 2nd respondent has rejected overtures made by the applicant for collective bargaining due to its recognition of KEPPA.

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[28] With regard to the vesting order which the applicant relies on in support of its submissions that the issue of recognition does not arise, counsel submits that the vesting order does not encompass a CA as no CA was mentioned in the vesting order. Further it is submitted that a CA is not a 'contract of employment'. A CA is a creature of statute and can only be entered into with a recognized union, it must be in writing, it must be for a minimum period of three years and it must be deposited for cognizance in the Industrial Court. It is submitted that a CA cannot be novated through a simple Vesting Order as a CA is subject to specific provisions under the IRA governing its variations. The MCBA-NUBE Agreement expressly states that it is only for 'member Banks' which have 'accorded recognition to the Union'. Thus AmBank Bhd and AmBank (M) Bhd have no legal capacity to vary the express provisions of the MCBA-NUBE Agreement which has been given cognizance by the Industrial Court and is deemed to be an award of the Industrial Court.

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[29] In the Minister's affidavit in reply he avers that he has considered the facts presented by both the applicant and the 2nd respondent as follows:

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(a) that the applicant was dissatisfied with the decision of the 2nd respondent in respect of the New CA;

(b) that the 2nd respondent has accorded recognition to the 3rd respondent KEPPA;

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(c) that the applicant's application to the High Court and the Court of Appeal to quash the decision of the DGIR to register KEPPA was dismissed;

(d) the 2nd respondent has never accorded recognition to the applicant;

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(e) on 30 December 2004 the 2nd respondent has accorded recognition to KEPPA for the period 1 January 2005 till 31 December 2007;

(f) the 2nd respondent has entered into a CA with KEPPA and recognized KEPPA as representing employees similar to the employees claimed by the applicant;

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(g) pursuant to s. 11 of IRA the applicant cannot claim for recognition until the expiry of three years;

(h) the applicant has never sought recognition from the 2nd respondent;

(i) the 2nd respondent takes the position that the applicant has no *locus standi* to enter into negotiation of a CA with the 2nd respondent;

(j) the applicant has failed to obtain a court order to set aside the recognition accorded to KEPPA.

[30] The Minister denies that he has acted in excess of his jurisdiction as alleged by the applicant. The Minister avers that:

(a) the conciliation carried out under s. 18 of IRA does not involve him;

(b) the DGIR referred the dispute to him on 16 May 2008;

(c) the letter dated 3 July 2007 was merely an advice to the applicant which the applicant was at liberty to disregard.

The Minister further avers that the CA between MCBA and the 2nd respondent has expired on 31 December 2002. Thereafter the 2nd respondent was no longer a member of MCBA and the applicant ought to have sought recognition from the 2nd respondent as a new entity and not a member of MCBA before the applicant invited the 2nd respondent to commence collective bargaining. The Minister avers that he is satisfied that the dispute between the applicant and the 2nd respondent does not involve any serious issue of fact/law that requires adjudication.

[31] Learned Senior Federal Counsel submits that s. 26(3) of IRA confers a discretion on the Minister whether or not to refer a trade dispute for adjudication. It is submitted that a trade dispute arises where an employer refuses to enter into negotiation with a union that it has accorded recognition. In the present case it is submitted that the Minister has not erred in finding that since the applicant has not obtained recognition from the 2nd respondent therefore the applicant has no locus to enter into negotiation with the 2nd respondent. In the absence of any recognition accorded by the 2nd respondent to the applicant, learned Senior Federal Counsel submits that the Minister has not erred in finding that there is no trade dispute to be referred for adjudication. Further it is submitted that in view of s. 11 of IRA, the applicant ought to wait three years before seeking recognition from the 2nd respondent. Learned Senior Federal Counsel submits that the decision made by the Minister in the exercise of his discretion does not suffer from any illegality, irrationality or procedural impropriety.

Decision

[32] The applicant relies on the vesting order to support its submissions that the 2nd respondent is bound by the 2000-2002 CA it entered into with AmBank Berhad. There is no dispute that the 2nd respondent has never accorded recognition to the applicant and there is no CA between the 2nd respondent and the applicant. However the applicant contends that recognition of the applicant by the 2nd respondent does not arise on the ground that the applicant had been accorded recognition by AmBank Berhad.

[33] The facts however show that AmBank Berhad and the 2nd respondent are two separate entities. As submitted by the 3rd respondent's counsel, AmBank Berhad is still in existence. It became known as AMBB Capital Berhad. It is now known as AmIslamic Bank Berhad. The 2nd respondent was originally known as MBf Finance Berhad. At that time the applicant's attempt to seek recognition by MBf Finance Bhd failed. Subsequently MBf Finance Berhad became AmFinance Berhad. On 22 December 2004 AmFinance Berhad accorded voluntary recognition to KEPPA. Thus on the facts I find that the applicant's contention that the 2nd respondent is bound by the 2000-2002 CA between the applicant and AmBank Bhd cannot be sustained as AmBank Bhd still exists. On the evidence I agree with the respondents that the 2nd respondent was never a member of MCBA nor has it ever had a CA with the applicant or MCBA.

[34] I agree with counsel for the respondents that recognition is a pre-requisite under s. 13 of IRA. The applicant failed to get recognition from MBf Finace Berhad, as the 2nd respondent was previously known. There is no evidence to show that by conduct the 2nd respondent has accorded recognition to the applicant. Hence I find that no recognition whatsoever has been accorded by the 2nd respondent to the applicant. The applicant has failed to satisfy the requirements of s. 13 of the IRA which expressly provides that only a trade union which has been accorded recognition by an employer may invite the employer to commence collective bargaining as follows:

> 13. Collective bargaining.
>
> (1) Where a trade union of workmen has been accorded recognition by an employer or a trade union of employers:
>
> (a) the trade union of workmen may invite the employer or trade union of employers to commence collective bargaining; or

[35] As the applicant has not been accorded recognition by the 2nd respondent I agree with the respondents that the applicant had no locus to invite the 2nd respondent to enter into negotiation of a CA with the applicant. The 2nd respondent acted within the law when it refused to enter into negotiation with the applicant. Since the applicant has not shown that it has satisfied the requirements of s. 13, there is therefore no trade dispute to be referred to the Industrial Court.

[36] In any event it is not disputed that on 22 December 2004 the 2nd respondent which was then known as AmFinance Berhad had voluntarily accorded recognition to KEPPA. Pursuant to the CA which had been given cognizance by the Industrial Court, the 2nd respondent has implemented the provisions of the CA and has paid arrears. The applicant's attempt to set aside the decision of the DGTU to register KEPPA was dismissed by the courts. Having accorded recognition to KEPPA, the 2nd respondent is therefore bound by the provisions of s. 9 of IRA and therefore could not accord recognition to the applicant.

[37] I agree with the 2nd respondent that a CA cannot be novated through a simple vesting order. As submitted by counsel for the 2nd respondent, a CA is subject to statutory provisions. In particular s. 14(2) of the IRA provides amongst others that a CA shall prescribe the procedure for its modification and termination. Article 3 of the applicant's agreement with MCBA states as follows:

> Article 3 - Modification And Termination
>
> (1) During the period of this Agreement, neither the Association nor the Union shall seek to alter, modify, annul or add to any of its provisions in any way whatsoever, except by mutual agreement between the parties.

Therefore, insofar as the 2000-2002 CA between the applicant and AmBank Berhad, there must be mutual agreement between both parties for the rights and obligations of AmBank Berhad to be taken over by the 2nd respondent. Needless to say the 2nd respondent would have to give its consent. However in the circumstances of this case there is no possibility for the 2nd respondent to agree in view of the CA it entered with KEPPA.

[38] Counsel for the applicant submits that there is no reason why two CAs cannot be in force at the same time within the 2nd respondent's institution. With respect I am unable to agree. Article 9 of the CA between the 2nd respondent and KEPPA provides that "The company shall recognize the Union as the sole negotiating body in respect of the

employees.". Thus under the CA there cannot be another union representing the 2nd respondent's employees. For the reasons stated, I find no basis for the submissions by counsel for the applicant that the 2000-2002 CA ought to override the CA between the 2nd respondent and KEPPA.

[39] I find that the applicant has failed to show any valid or cogent grounds upon which this court ought to exercise its discretionary power of judicial review and to quash the decision of the Minister. For the reasons stated above I find that the Minister has not erred in his decision not to refer the dispute to the Industrial Court for adjudication. I agree with the learned Senior Federal Counsel that the decision of the Minister does not suffer from the infirmities of illegality, irrationality or procedural impropriety. Therefore the application is dismissed with costs of RM10,000 to each respondent.